

No. 76-166

Supreme Court, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1976

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LEONARD DIXON, PETITIONER

v.

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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ROBERT H. BORK,  
*Solicitor General,*  
*Department of Justice,*  
*Washington, D.C. 20530.*

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The primary contention in this income tax evasion case is that the trial court should not have accepted a stipulation, entered into near the close of the government's case, in which petitioner agreed to the amounts of his unreported income and his correct income tax liability, without questioning petitioner to insure that he understood that he was waiving certain rights.

After a jury trial in the United States District Court for the Central District of California, petitioner was found guilty on one count of conspiracy to evade income taxes, in violation of 18 U.S.C. 371, and on five counts of willfully attempting to evade his income taxes for 1966 through 1970, in violation of 26 U.S.C. 7201. He was sentenced to four consecutive two-year terms of imprisonment and two additional two-year terms to run concurrently with the consecutive terms, and a \$6,000 fine (Pet. 4, 5). The court of appeals affirmed (Pet. App. 7-12).

At trial, petitioner admitted that he had acquired assets under fictitious names (Tr. 298, 301, 311, 336); that he had conducted all of his financial dealings in cash (Tr. 325-326); and that he derived his income from illegal sources (Tr. 303-304). The conceded unreported income over the five-year period was \$68,486.73 (Tr. 263-264).

1. Petitioner contends (Pet. 6-8) that the trial court should not have allowed him to stipulate to the unreported income and tax liability without personally questioning him in order to insure that he understood he was waiving certain rights. But petitioner did not make any substantial concession in entering into the stipulation near the end of the government's case (Tr. 263-264). At that point in the trial, the government had already introduced into evidence delinquent income tax returns filed by petitioner during the investigation (Govt. Exs. 65 through 69), which showed that he had realized unreported income of \$66,000 during the five prosecution years (Tr. 243, 245-249).<sup>1</sup> Shortly thereafter, petitioner admitted during his testimony that these delinquent returns (which were filed only a few months before the indictment was returned) were correct (Tr. 343-350, 367-368).

Petitioner obviously believed at trial that it was to his advantage to enter into this stipulation. He should not be permitted to change his position now. Cf. *Johnson v. United States*, 318 U.S. 189, 201.

*McCarthy v. United States*, 394 U.S. 459, relied upon by petitioner (Pet. 6), is distinguishable. There, the court accepted a guilty plea without making personal inquiry of the defendant as required by Rule 11 of the Federal Rules of Criminal Procedure. But, unlike the stipulation

<sup>1</sup>In the stipulation, petitioner conceded that he had realized income during the five years of \$68,486.73 (Tr. 263-264).

in this case, "a guilty plea is an admission of all the elements of a formal criminal charge." *McCarthy v. United States*, *supra*, 394 U.S. at 466. Here, however, the stipulation established little or nothing that was not already in the record, and left open the crucial question of willfulness.<sup>2</sup>

As the court of appeals pointed out, petitioner's "principal defense at trial appears to have been that he did not realize that income derived from illegal sources was taxable" (Pet. App. 8). In this respect, the stipulation as to the amount of unreported income did not significantly aid the government's case. Since the government had almost concluded its case at the time the stipulation was entered into (Tr. 263-264) and thereafter called only one additional witness (Tr. 280), there is no substance to petitioner's claim (Pet. 7) that "the practical effect of defense counsel's stipulation was a waiver of petitioner's right to confront and cross-examine the government's witnesses."

2. Petitioner further argues (Pet. 8-9) that the trial judge should have recused himself, in accordance with petitioner's request on the day of sentencing, because he had received information in affidavits submitted by the government in connection with the question of bail which may have impelled him to impose a more severe sentence than he otherwise would have done. The court of appeals carefully considered this contention and rejected it in the following language (Pet. App. 11-12):

<sup>2</sup>*Brookhart v. Janis*, 384 U.S. 1 (Pet. 6, 7), is similarly distinguishable. There, the defendant consented to a procedure known as a "prima facie" trial in which the prosecution makes only a *prima facie* showing of guilt and the defendant does not offer evidence or cross-examine witnesses. Under these circumstances, this Court reversed the conviction, agreeing with the trial court's characterization of the procedure as "the practical equivalent of a plea of guilty" (384 U.S. at 7).

Appellant contends that severity of sentence was enhanced by information contained in affidavits by government agents, the substance of which was not disclosed to him. The district court, however, expressly *disclaimed reliance on the affidavits*. Appellant<sup>3</sup> contends that references made by the judge in imposing sentence to appellant's past activities show that the judge in fact did rely on information obtained from the affidavits and that his disclaimer should be rejected. Information supporting the judge's remarks, however, was supplied by appellant's own admissions at trial and by a presentence report received by the judge prior to sentencing. We see no occasion for rejection of the disclaimer. We find no abuse of discretion.

Appellant contends that under *Gregg v. United States*, 394 U.S. 489 (1969), receipt by the district judge of the affidavits prior to completion of trial disqualified the judge from further participation in the case. We disagree. The affidavits were presented to the court in a matter respecting release of the accused on bail, and clearly were not presented or intended to serve as a presentence report to assist the court in sentencing under Rule 32(c)(1). They thus were not such a file or document as was before this court in *United States v. Montecalvo*, F. 2d (9th Cir., Mar. 15, 1976), and under *United States v. Duhart*, 496 F. 2d 941 (9th Cir. 1974), neither Rule 32 nor *Gregg* applies.

<sup>3</sup>The six italicized words were omitted from the court's slip opinion and from the appendix to the petition (Pet. App. 11). We have been advised by the Clerk of the court of appeals that the opinion was corrected on September 13, 1976.

3. Finally, petitioner argues (Pet. 9-10) that the trial court erred in refusing to hold a hearing on his contention that the grand jury processes had been abused. He complains that the defense "made a showing regarding a common form of misuse of the grand jury, the use of grand jury subpoenas to aid the prosecutor in obtaining evidence" (Pet. 10). However, it is the primary function of a grand jury to investigate possible criminal wrongdoing and, in so doing, to unearth evidence to be used by the prosecutor at trial. See *United States v. Calandra*, 414 U.S. 338, 342-346, and cases cited therein; Rule 6(d) of the Federal Rules of Criminal Procedure. In using subpoenas to obtain evidence of criminal conduct, which the prosecutor used in convicting petitioner, the grand jury was properly performing its normal duty.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,  
*Solicitor General.*

SEPTEMBER 1976.